In the

United States Court of Appeals

For the Ninth Circuit

APPELLANT'S OPENING BRIEF

FILED

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No. 16135

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

W. D. MacKay,

Appellant,

vs.

American Potash & Chemical Co., Inc., a corporation, and Stauffer Chemical Company, a corporation,

Appellees.

APPELLANT'S OPENING BRIEF.

Jurisdiction.

This suit for recovery of damages for breach of a contract for personal services in obtaining natural gas service was commenced by W. D. MacKay, a resident of California, against American Potash & Chemical Company, a Delaware corporation, and West End Chemical Co., Inc., a California corporation in the Superior Court of Los Angeles County. The action was thereafter removed to the United States District Court for the Southern District of California on the petition of American Potash & Chemical Co. [R. 3-15.]

The jurisdiction of this Court rests upon Section 1291 of the Judicial Code as amended. (28 U. S. C., Sec. 1291.)

Statutes.

The pertinent statutes are Sections 1091 *et seq.* of the California Public Utilities Code and Section 339(1) of the California Code of Civil Procedure.

Statement of Facts.

The appellant filed his complaint in the Superior Court of Los Angeles on August 2, 1957 seeking declaratory relief and damages for breach of an oral contract whereby the appellees had agreed to pay appellant reasonable compensation for his services in securing natural gas service to appellees' plants located in or near Trona, California. [R. 10.]

It is undisputed that prior to the time appellant claims such oral contract was made, in July, 1952 [R. 11] appellees were using expensive fuel oil as fuel for their plants, at a great increase over the cost of natural gas. This was due to the fact that such plants were distant from any natural gas transmission or distribution system.

It is undisputed that executive representatives of appellees discussed their desire to obtain natural gas with appellant in July, 1952.

It is undisputed that thereafter, on April 11, 1955, appellees made a contract with Pacific Gas & Electric Company for natural gas service, and that thereafter, on July 12, 1955, the Public Utilities Commission of the State of California approved such contract, and granted P. G. & E. a certificate of public convenience and necessity to construct the necessary facilities to serve appellees with natural gas. [R. 12, 16, 17, 24.]

Finally, it is undisputed that on October 1, 1955 American Potash & Chemical Co. *first* received natural gas from P. G. & E. through such facilities [R. 12, 17, 24] and Stauffer Chemical Company (West End Chemical Company's successor) *first* received gas on November 16, 1955.

By their answers, the appellees, of course, deny that such a contract was made, and dispute appellant's alle-

gations that he was instrumental in any way in securing such service. [R. 17, 24.] Each of the appellees pleaded Section 339(1) of the California Code of Civil Procedure as a statute of limitations to appellant's cause of action. [R. 21, 28.]

Thereafter defendant American Potash & Chemical Company made a Motion to Dismiss based on the Statute of Limitations, and a Motion for Summary Judgment. [R. 70.]

Appellant filed the following documents in opposition:

1. Affidavit [R. 97];
2. Motion to Strike portions of Affidavits in Support of Motion for Summary Judgment [R. 100];
3. Motion for Continuance for the Purpose of Further Discovery. [R. 104.]

Following several continuances, the matter came on for hearing on March 17, 1958, whereupon the following contradictory statements were made by Judge Westover who ignored all of appellant's motions [R. 129-130]:

> "The Court: I am dismissing the case because it appears your case is barred by the statute of limitations, and I don't think there is anything you can do to rectify that."
>
> * * * * * * * *
>
> "I will do one of two things, as I said. I will give you a 30-day continuance, provided you reimburse the defendant for the cost of coming down here these two days, or I will dismiss the case."
>
> * * * * * * * *
>
> "The Court: I have a motion for summary judgment. The motion is granted."
>
> * * * * * * * *
>
> "Mr. Whelan: Both the motion to dismiss and the motion for summary judgment are granted?

The Court: No. The motion for summary judgment with findings of fact and conclusions of law."

Thereafter, the judgment appealed from was entered [R. 113], which was in form a summary judgment.

Although appellant must presume that the judgment involved is a summary judgment it is not entirely clear that Judge Westover did what he meant to do. Apparently he intended to grant the motion to dismiss. However, he granted the motion for summary judgment. This uncertainty alone is significant and indicative of the rather arbitrary manner in which the Court ignored appellant's motion for further discovery procedures and refused to rule on appellant's motion to strike the affidavits in support of the motion for summary judgment for violation of the Federal Rules [R. 100, 104] which were before him. Without such affidavits, of course, the motion would fall.

Questions Presented.

1. Which motion did Judge Westover grant—the motion for summary judgment, or the motion to dismiss;
2. Did the Court err in refusing to strike the hearsay and other defective allegations in the affidavits supporting the motion for summary judgment under Rule 56(e) F. R. C. P.;
3. Construing all documents most favorably to appellant, can it be said that no genuine triable issue of fact remained in the case;
4. Assuming that the judgment was one of dismissal on the ground of the statute of limitations, when did the statute begin to run: (1) When the contract in issue was made; or (2) when it was breached on or after October 1, 1955?

ARGUMENT.

A. The Findings of Fact Are Clearly Erroneous, Since Genuine, Triable Issues of Fact Remained.

1. Appellees' Affidavits.

This case was tried on affidavits—and defective affidavits by appellees at that, fairly reeking with hearsay, conclusions, opinions and argumentative statements. Appellant earnestly requests the Court to examine appellees' affidavits (*the only evidence* supporting the findings of fact) [R. 48-51] and decide the merit of appellant's motion to strike them. [R. 100.] Appellant submits that when such affidavits are "trimmed" the findings are clearly without foundation, and clearly erroneous.

2. Appellant's Affidavit.

Following the motion for summary judgment appellant filed his affidavit [R. 97] in opposition. Such affidavit directly and unequivocally presents triable issues of fact determinative of this case. In ignoring such affidavit and granting the motion, the trial court erred.

3. Judged by This Court's Decisions on Summary Judgment, the Proceedings Here Were Defective.

Gifford v. Travellers Protective Association of America, 153 F. 2d 209 (C. C. A. 9th, 1946);

Koepke v. Fontecchio, 177 F. 2d 125 (C. A. 9th, 1949);

Suckow Borax Mines Consol. Inc. v. Borax Consol. Ltd., 185 F. 2d 196 (C. A. 9th, 1950), cer. den. 340 U. S. 946, reh. den. 341 U. S. 912;

City of Anchorage v. Ashley, 196 F. 2d 809 (C. A. 9th, 1952);

Hoffman v. Babbitt Bros. Trading Co., 203 F. 2d 636 (C. A. 9th, 1953);

Byrnes v. Mutual Life Ins. Co. of N. Y., 217 F. 2d 497 (C. A. 9th, 1954), cer. den. 348 U. S. 971;

Hycon Mfg. Co. v. H. Koch & Sons, 219 F. 2d 353 (C. A. 9th, 1955).

In *Albert v. Brownell,* 219 F. 2d 602 (C. A. 9th, 1954), the Court said (p. 605):

> ". . . the finding of one genuine issue of material fact such as this is sufficient to prevent a summary judgment on all issues. . . ."

Even if full credence were given to appellees' defective affidavits, genuine issues of fact would still remain as to the existence of a contract, whether appellant obtained or aided in obtaining the gas service, etc. The question on such a motion is not *how* an issue should be decided—but whether there is an issue. Judge Westover's view of the merits blinded him to the mandatory substantive requirements.

B. The Statute of Limitations Did Not Begin to Run Until Natural Gas Service Commenced in October and November, 1955 and Appellees Refused to Pay Appellant. This Action, Filed August 2, 1957 Was Thus Not Barred by the Two Year Statute.

Although it seems that the Court did not dismiss on the statute of limitations issue, appellant desires to point out that appellees admit that gas service did not begin until October 1, 1955. [R. 16, 17, 24.] Thus, the alleged contract could not be breached by appellees until their refusal to pay appellant following such commencement of service, and the two year statute could not run until such date.

Richardson v. Craig, 11 Cal. 2d 131 (1938);

Thompson v. Orena, 134 Cal. 26 (1901);

Pitzer v. Wedel, 73 Cal. App. 2d 86 (1946);
Hay v. Casey, 30 Cal. App. 570 (1916);
Lazzarevich v. Lazzarevich, 88 Cal. App. 2d 708 (1948);
Baker v. Joseph, 16 Cal. 173 (1860);
Irvine v. Bossen, 25 Cal. 2d 652, 155 P. 2d 9 (1944).

This is true because regardless of the execution of the P. G. & E. contract, the breach could not occur until gas service began following Commission approval, and refusal to pay was made by appellees. Appellant's action was timely filed.

C. The Trial Court's Refusal to Rule on Appellant's Motion to Strike Appellees' Affidavits and Appellant's Motion for Continuance to Exhaust Discovery Was an Abuse of Discretion.

Under the circumstances (Motion for Summary Judgment) the Court's flat refusal to rule on appellant's motions [R. 128-129] was a flagrant abuse of discretion and cannot be justified. Appellant was denied due process of law under the California and United States Constitutions.

D. Conclusion.

Wherefore, appellant prays the judgment be reversed.

Respectfully submitted,

W. D. MacKay,

In Propria Persona.